

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
2 FOR THE COUNTY OF MULTNOMAH  
3  
4

THE ESTATE OF MICHELLE )  
5 SCHWARZ, deceased, by and )  
through her Personal )  
6 Representative, RICHARD )  
SCHWARZ, ) Vol. 37-A  
7 )  
Plaintiff, ) Circuit Court  
8 ) Case No. 0002-01376  
vs. )  
9 )  
PHILIP MORRIS INCORPORATED, )  
10 a foreign corporation, and )  
ROTHS I.G.A. FOODLINER, )  
11 INCORPORATED, an Oregon )  
corporation, )  
12 )  
Defendants. )

13  
14 TRANSCRIPT OF PROCEEDINGS  
15

16 BE IT REMEMBERED, That the  
17 above-entitled matter came on regularly for Jury  
18 Trial and was heard before the Honorable Roosevelt  
19 Robinson, Judge of the Circuit Court of the County  
20 of Multnomah, State of Oregon, commencing at 9:00  
21 a.m., Monday, March 4, 2002.  
22

23 \* \* \*

Jennifer L. Wiles, CSR, RPR.  
24 710 Multnomah County Courthouse  
1021 SW Fourth Avenue  
25 Portland, Oregon 97204

## 1 APPEARANCES:

2 Mr. D. Lawrence Wobbrock, Attorney at Law,  
3 Mr. Charles S. Tauman, Attorney at Law,  
4 Mr. Richard A. Lane, Attorney at Law,  
5 Appearing on behalf of the Plaintiff;

6 Mr. James L. Dumas, Attorney at Law,  
7 Mr. John W. Phillips, Attorney at Law,  
8 Appearing on behalf of Defendant  
9 Philip Morris, Incorporated and Defendant  
10 Roths I.G.A. Foodliner, Incorporated;

11 \* \* \*  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1	GENERAL INDEX	3			
2			Page		
3	March 4, 2002, A.M. Proceedings	4			
4	Reporter's Certificate	69			
5	* * *				
	WITNESS INDEX				
	FOR THE PLAINTIFF:	Direct	Cross	ReD	ReX
	Nancy Lund				
12	By Mr. Dumas	16			
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					

(March 4, 2002)

\* \* \*

A.M. PROCEEDINGS

\* \* \*

(Whereupon, the proceedings were reported, in Room 608, out of the presence of the jury, as follows:)

\* \* \*

THE CLERK: All rise. Court is in session.

THE COURT: Good morning. And please be seated.

MR. PHILLIPS: Good morning, Your Honor.

THE COURT: Any matters for the Court before we bring the jury?

MR. TAUMAN: We have two, I guess, probably procedural or logistic matters that are quite important I think both to the Court to the jury and to the parties.

The first is witness scheduling. We learned last night that there were three casualties on the defendant's witness list. So now they are down to one, two, three, four, five, six remaining witnesses.

The reason I raise this is, first of all, to document it for the record. But also to

1       thank the defendants for notifying us of this  
2       change and to, of course, encourage them to  
3       continue to notify us of any changes.

4       The reason is, of course, that we are  
5       preparing to cross-examine witnesses in the  
6       order that they appear. And we may not have  
7       the actual documents that we need or the  
8       materials that we need for cross-examination,  
9       if there's a last-minute change.

10       It's also a way of asking the Court's  
11       indulgence, if that does happen, we may not,  
12       things may not run as smoothly as everyone  
13       would like.

14       And the third matter as far as scheduling  
15       is because it appears that the defense case now  
16       has been compressed, at least they, I think,  
17       acknowledge by at least a day. We may have  
18       some trouble scheduling our rebuttal witnesses,  
19       which, of course, we don't even know who they  
20       may be at this point because they would be in  
21       response to evidence that comes in in the  
22       defense.

23       So, I'm asking, A, to be seasonably  
24       up-dated, which the defendants have been very  
25       good at doing so far; and, B, probably in

1 advance, the Court's indulgence on the  
2 scheduling of our rebuttal witnesses.

3 The second is probably of more concern.  
4 And that is that I believe that we have been  
5 operating on, as Your Honor put it, in our  
6 case, in the old-fashioned way of dealing with  
7 exhibits, and that is that you show them to  
8 opposing counsel before you flash them up on  
9 the board.

10 We would request that the same thing be  
11 done in terms of demonstrative evidence. They  
12 have a very nice PowerPoint program, and it is  
13 real easy to then flash those up on the board.

14 And we would request that maybe there's a  
15 way, Mr. Walsh is the master of the mixer,  
16 maybe there's a way that they can appear, for  
17 at least a few seconds on our screen, before  
18 they go up in front of the jury.

19 THE COURT: Counsel, is that possible?  
20 Like, if you are doing to do a, put something  
21 on the screen, can you put it on the small  
22 screen, say, 15 or 20 seconds before you put it  
23 on the larger screen? Is that a possibility?

24 MR. PHILLIPS: Whatever you want, Your  
25 Honor. I'll just make the observations that,

1 for demonstratives, we did ask that substantive  
2 exhibits that Mr. Wobbrock or Mr. Tauman were  
3 going to use would be shown to us in advance,  
4 but the demonstratives were not in the  
5 plaintiff's case. So that would be changing  
6 the protocol.

7 So whatever the Court wants to do in that  
8 regard.

9 THE COURT: If we have the technology to  
10 do it, it doesn't seem to be a big problem. If  
11 we have the technology to do that, let's just  
12 do it, and then if they have some great  
13 objection maybe that will slow us down some  
14 more, but let's do it as how that works.

15 MR. PHILLIPS: Let me follow up on Mr.  
16 Tauman's comments briefly.

17 Oh, I'm sorry.

18 MR. WOB BROCK: That last subject, Your  
19 Honor, they have been providing us with the  
20 hard copies of that, after they have finished  
21 with the witnesses.

22 I think the simplest way would be to  
23 provide us with those before they get started.  
24 Then we wouldn't have to stop and look at the  
25 screen.

1           Here's the reason I'm concerned about  
2           this, Judge. Looking at prior testimony of  
3           these witnesses, and most of them on both sides  
4           have testified somewhere before, as the Court  
5           has probably understood by now.

6           There's been a problem with at least a  
7           couple of the witnesses starting to quote and  
8           refer to hearsay documents. And it has  
9           appeared that on occasion those hearsay  
10          documents have even actually been printed out  
11          or portions of them on these demonstratives and  
12          then flashed up on the screen.

13          It doesn't seem to be appropriate, No. 1,  
14          to do that, unless it is otherwise qualified  
15          under the rules of evidence. And, No. 2, to  
16          once get it up there, and then have me object  
17          after the jury has seen it I think is improper,  
18          also.

19          So, I think the best way is to just simply  
20          give us these documents that they have, that  
21          they have given us so far afterwards, because  
22          the Court has announced these are all going  
23          into evidence, and let us look at them, and  
24          then we can move this along without having to  
25          stop and ponder over the screen and the screen



1 resolution isn't all that great.

2 So, I ask this morning, if they have  
3 demonstratives coming up with the next witness,  
4 give them to us now in hard copy. Then we can  
5 proceed. It will probably take two minutes to  
6 look at them.

7 MR. PHILLIPS: Well, yeah, I mean  
8 turnabout is fair play. And they showed us  
9 their demonstratives when they have put them  
10 on. They didn't give us package beforehand and  
11 give us a chance to look at them before the  
12 direct as well as before the cross-examination.

13 What we can do, Your Honor, and I think  
14 what we are willing to do, consistent with what  
15 you have just said, is to give them a hard copy  
16 of a demonstrative as it is presented.

17 You know, an exam is a dynamic process.  
18 Mr. Dumas, with the witness this morning, is  
19 not going to use all of those demonstratives.  
20 There's no reason to give the demonstrative to  
21 counsel if Mr. Dumas elects not to use it in  
22 the exam.

23 So, I just think they have got to be fair  
24 and consistent with both sides.

25 And I appreciate Your Honor's suggestion

1 that if we have the technology and we have got  
2 a hard copy we can get it to them before we do  
3 that.

4 But it doesn't seem to be fair or at least  
5 consistent with what the parties' obligations  
6 have been and what their obligations were in  
7 their opening case to require a disclosure  
8 before the fact of all of the demonstrative  
9 exhibits, some of which may be used, some of  
10 which may not be used.

11 MR. WOBBROCK: Judge, in that regard, I  
12 think almost every demonstrative I have used,  
13 for examples, if you could see those charts  
14 over in the corner, those organizational  
15 charts, those are already in evidence. They  
16 are just blown up of what's in these boxes that  
17 they didn't object to.

18 If there was any demonstrative that I  
19 used, it was probably less than two or three  
20 that hadn't been shown. That's point No. 1.

21 Point No. 2, the way I have understood  
22 this process, as long as I have been a lawyer,  
23 it is an adversarial process. If they had a  
24 problem, they should have raised it. The  
25 reason they didn't have a problem is it hasn't

1       come up.

2             The only demonstrative I think I may have  
3       put on, that they hadn't seen, is probably the  
4       picture of the family. That's it. The rest of  
5       them are all in evidence.

6             And so I think it's -- the reason that  
7       they didn't need to see them before is because  
8       they had seen them before when we provided them  
9       with all of the exhibits. So, I don't think  
10      it's a different standard.

11            MR. PHILLIPS: Well, I think it is, Your  
12      Honor. He made a number of demonstratives in  
13      front of the jury, and I didn't tell him to  
14      secrete that, those demonstratives, and not  
15      show them in front of the jury.

16            It is just a matter of giving counsel the  
17      liberty in the courtroom to create the  
18      demonstratives that he wants to use with his  
19      witness and not forcing hand.

20            And, you know, I didn't object to that  
21      because I think that is appropriate for Mr.  
22      Wobbrock to do.

23            He's objecting to it after being given the  
24      liberty to it, saying, well, you just missed an  
25      opportunity.

1 But I think it is just fairness, trying to  
2 give each side a fair chance to present their  
3 case in the way that they want.

4 You have already instructed that we could  
5 show the demonstratives as we use it, which  
6 them, as we go forward, which is different, but  
7 we'll do it, Your Honor.

8 Requiring us to give a package beforehand  
9 strikes me as being more than what is  
10 warranted, before it is actually shown to the  
11 jury.

12 THE COURT: Right. You won't have to give  
13 them the whole package but just the ones you  
14 will use. And let's just see how it will work  
15 out, counsel. If you have problems, let me  
16 know.

17 Let's just go ahead and give them hard  
18 copies. They will be giving you hard copies of  
19 the ones you are going to use. You are  
20 probably going to be getting them at the same  
21 time as the person is on the witness stand, so  
22 you'll have to read them real quick. But if  
23 there's a problem, let the Court know. But  
24 let's try and see how it works first.

25 MR. WOBBROCK: Hard copies before they are

1 shown on the screen? Is that the rule?

2 MR. PHILLIPS: That's what we intend to  
3 do.

4 THE COURT: Right.

5 All right. Any other small problems?

6 MR. PHILLIPS: To the issue that I wanted  
7 to talk about, and this does relate to exhibits  
8 and trying to, as we move forward with  
9 witnesses, as it becomes more exhibit-intensive,  
10 if we get done with this witness before the end  
11 of the day today, I would like to have -- we  
12 can discharge the jury a little early. But I  
13 would like to spend some time with Mr. Lane and  
14 you and me and whoever else on the plaintiff's  
15 side wants to get it finalized, the plaintiff's  
16 exhibits that you essentially pre-admitted,  
17 with a couple of caveats, and then the  
18 remaining defendant's exhibits to be offered  
19 for admission that are no longer subject to  
20 either withdrawal or exclusion.

21 THE COURT: All right. That will be fine.

22 MR. PHILLIPS: Thank you.

23 THE COURT: Bring the jury, please.

24 \* \* \*

25 (Whereupon, the proceedings continued, in the

1 presence of the jury, as follows:)

2 \* \* \*

3 THE COURT: All right. Good morning,  
4 members of the jury.

5 JURORS: Good morning.

6 THE COURT: In case you are not counting,  
7 this is the beginning of our fifth week of  
8 trial. So I know you are ready to proceed.

9 But I know you have some administrative  
10 concerns. And we will try to get to the bottom  
11 of that. We have a new computerized system.  
12 And I think it is not just this county that's  
13 having problems. I think some other counties  
14 are having problems, too. And we'll try to get  
15 to the bottom of those problems as soon as we  
16 can.

17 Thank you.

18 All right. Counsel for the defense, would  
19 you call your next witness, please?

20 MR. DUMAS: Thank you, Your Honor.

21 The defendant calls Ms. Nancy Lund to the  
22 stand.

23 THE COURT: All right.

24 Ms. Lund, please come up, please.

25 THE CLERK: Please remain standing and

1 raise your right hand.

2

3 NANCY LUND

4 was thereupon called as a witness on  
5 behalf of the Defendant and, having been first duly  
6 sworn, was examined and testified as follows:

7

8 THE CLERK: Thank you. Please be seated.

9 And for the record, will you please state  
10 your full name?

11 THE WITNESS: Yes. My name is Nancy Lund.

12 THE CLERK: Spell your last name, please.

13 THE WITNESS: L-u-n-d.

14 THE CLERK: Thank you.

15 THE COURT: Ms. Lund, could we get you to  
16 speak up a little bit? Your voice is fairly  
17 soft. The jurors need to hear You. The  
18 attorneys need to hear you. The other  
19 attorneys need to hear you. And, last of all,  
20 I need to hear you.

21 THE WITNESS: Okay.

22 THE CLERK: You need to speak real closely  
23 to the microphone.

24 THE WITNESS: All right. So, I'll sit up  
25 closely and see if it works.

1 THE COURT: All right.  
2 Mr. Dumas, proceed, please.  
3 MR. DUMAS: Thank you.  
4

5 DIRECT EXAMINATION

6  
7 BY MR. DUMAS:  
8 Q Good morning, Ms. Lund.  
9 A Good morning, Mr. Dumas.  
10 Q How are you employed?  
11 A I work for Philip Morris USA in New York  
12 City.  
13 Q How long have you worked for Philip  
14 Morris?  
15 A About 17 years.  
16 Q Okay. So, you work in New York City?  
17 A Yes, I do.  
18 Q Do you live there, as well?  
19 A No, I don't.  
20 Q Where do you live?  
21 A I live in [DELETED].  
22 Q Where?  
23 A In [DELETED].  
24 Q How far is that away from [DELETED]?  
25 A Well, it's about 40 miles, about an hour



1 and a half on the train every day.

2 Q You take the train to work every day?

3 A Yes, I do.

4 Q Do you have family?

5 A Yes, I do.

6 Q Tell us about your family.

7 A Well, I have a husband. And I have a son  
8 who's 13-years old. And a dog named Chance.

9 Q Well, since your son might want his name  
10 mentioned, as well, along with the family dog,  
11 what's his name?

12 A I didn't mention his name. His name is  
13 Jeff.

14 Q Jeff. All right.

15 What is your job title, Ms. Lund?

16 A I'm the Senior Vice President of  
17 Marketing.

18 Q Senior Vice President of Marketing. What  
19 does that mean? What do you do?

20 A Well, my job is to coordinate the  
21 activities of all of our domestic cigarettes brands,  
22 brands like Marlboro and Benson & Hedges and Merit  
23 and Basic and Virginia Slims. So, to develop the  
24 marketing plans to see to it that the marketing  
25 plans happen in the marketplace.

1 Q And you have been in the marketing  
2 department at Philip Morris for 17-plus years?

3 A Yes.

4 Q How old are you?

5 A I'll be 50 in October.

6 Q Congratulations, I guess.

7 Who do you report to? Who is your  
8 boss at Philip Morris?

9 A I report to the Chief Executive Officer  
10 and President Mike Szymanczyk.

11 Q Do you have any other intervening boss or  
12 do you report to the head guy at Philip Morris?

13 A I do report to the head guy, yes.

14 Q Anyone else you report to in between you  
15 and the head guy?

16 A No.

17 MR. DUMAS: All right.

18 Demonstrative No. 1, please.

19 Any objection, counsel?

20 MR. WOBBROCK: One second, please.

21 No objection.

22 THE COURT: Proceed, please.

23 BY MR. DUMAS:

24 Q Ms. Lund, at my request, did you have  
25 prepared a simple, I guess it is simple,

1 organizational chart showing the senior vice  
2 presidents who report to the President  
3 Mr. Szymanczyk?

4 A Yes, I did.

5 Q Okay. And it looked like there's, what  
6 ten, 11, 12 senior vice presidents?

7 A Twelve.

8 Q Okay. And you're one of them?

9 A Yes, I am.

10 Q You are right here over on the -- there we  
11 go.

12 Thank you, Mr. Walsh.

13 A Yes, that's me.

14 Q That's you. Okay.

15 Now, you talked a little bit about  
16 your job description. What do you do on a day-in,  
17 day-out basis? When you get in the office and you  
18 have got your cup of coffee, what are you doing?

19 A Well, I work the folks in the brand  
20 marketing area. And I work with them to try to  
21 understand the marketplace, the cigarette  
22 marketplace in the United States, and I try to help  
23 them build plans to increase our market share in the  
24 United States marketplace, so to kind of understand  
25 the market and to understand the brands that we

1 have, and to see if we can find ways to connect the  
2 brands that we have with the adult smokers out in  
3 the marketplace.

4 Q What are you prepared to talk to this jury  
5 about today?

6 A Well, I am prepared to talk about how we  
7 market our cigarette brands in the United States. I  
8 am prepared to talk about Merit cigarettes and  
9 Benson & Hedges cigarettes and prepared also to talk  
10 about how we market our light and low-tar  
11 cigarettes. And also, if I have the opportunity, to  
12 talk a bit about how things have changed over the  
13 years in the way we do what we do.

14 Q The way Philip Morris does what it does?

15 A Yes.

16 Q Is there anyone at Philip Morris in the  
17 marketing, in the advertising department who's more  
18 senior than you?

19 A No, there isn't.

20 Q Is there anyone at Philip Morris, New York  
21 City, is there anyone at Philip Morris New York City  
22 who is more familiar, more responsible for the way  
23 Philip Morris markets and advertises its products  
24 than you?

25 A No, there is not anyone.

1 Q Let's talk a little bit about your  
2 background.

3 Where were you born and raised?

4 A I was born in Somers Point, New Jersey.  
5 And I grew up in a small town right next to it  
6 called Northfield, New Jersey.

7 Q Where did you go to high school?

8 A I went to Mainland Regional High School,  
9 in Linwood, New Jersey, the town next to New York  
10 Field, New Jersey.

11 Q Where did you go to college?

12 A Lafayette College in eastern Pennsylvania.

13 Q Tell us about Lafayette College.

14 A Well, it's a liberal arts college right on  
15 the Delaware River. And it also has an engineering  
16 school and a science program.

17 Q What year did you graduate from Lafayette?

18 A I graduated in 1974.

19 Q What was your major or degree in?

20 A I had a bachelor of arts degree in French  
21 much.

22 Q Not marketing? French?

23 A No. French.

24 Q Okay. Not French marketing? French?

25 A No. French. French.

1 Q Okay. How does a French major end up at  
2 the head of marketing at Philip Morris USA?

3 A Well, I don't know that being a French  
4 major has anything to do with how I'm a Senior Vice  
5 President of Marketing. And it's a pretty long  
6 story from there to here.

7 Q All right. So, you graduated from college  
8 in 1974. What did you do after that?

9 A Well, I stayed on at Lafayette College.  
10 And I raised money for Lafayette for five years.

11 Q Five years raising money. What was your  
12 job title, and what did you do for the college?

13 A I was Associate Director of Development.  
14 And development really means fund raising. And my  
15 job was to talk to alumni, get to know the alumni of  
16 the college, and to see if we could convince those  
17 alumni to write checks to Lafayette College, make  
18 contributions to Lafayette College, instead of  
19 making contributions elsewhere.

20 Q Was that kind of a marketing job?

21 A Oh, I would say it is very much a  
22 marketing job, yeah.

23 Q What did you learn in your five years as  
24 being a fund raiser for Lafayette College? What did  
25 you learn about marketing?

1 A Well, I think I learned some of the  
2 basics. You know, I think you really have to reach  
3 out and try and understand the market. You know, in  
4 this case, it was alumni and parents and friends and  
5 corporations and foundations, and understand why and  
6 what they make contributions to, to figure out if  
7 they would want to make a contribution to Lafayette.  
8 So, market is very important in the equation.

9 Q Did you like that job?

10 A I loved that job.

11 Q Why?

12 A Well, it was very challenging. To get  
13 people to write checks and make contributions is a  
14 hard job.

15 Q You said you were there for about five  
16 years. What did you do after you left the fund  
17 raising job at the college?

18 A I went to work for Wells Rich Greene,  
19 which was an ad agency in New York City.

20 Q And what was it about that job that  
21 attracted you enough to leave the college?

22 A Well, I had been doing that fund raising  
23 job for about five years, and I thought, boy, the  
24 chance to go to New York City was, first of all,  
25 very exciting, and to go and work for a big ad

1 agency and learn how the agencies develop their  
2 advertising and created the ads was really, really  
3 quite a neat opportunity. So, that's why I went.

4 Q Okay. So, you moved to New York City  
5 about what year then?

6 A It was about 1979.

7 Q Tell us a little bit about Wells Rich.  
8 You said it was an advertising agency. Tell us  
9 about that.

10 A Well, it was a big advertising agency.  
11 And it had lots of clients. It had New York State  
12 as a client. It had Procter & Gamble as a client.  
13 It had many clients.

14 Q What was your job title there?

15 A I was an Assistant Account Executive when  
16 I went to work at Wells Rich Greene.

17 Q What does an Assistant Account Executive  
18 do?

19 A Well, I think the Assistant Account  
20 Executive, and all kind of account executives, our  
21 job was to talk with the brand managers at those  
22 clients, like at Procter & Gamble, which is what I  
23 worked on, and talk to those brand managers and find  
24 out what it is they wanted to do with their brands,  
25 how they wanted to market the brands, what kind of



1 advertising they wanted, what kind of media they  
2 wanted, what kind of promotions they wanted. And  
3 then go back to the ad agency and talk to the  
4 creative people, you know, like the copywriters and  
5 the art directors and the media buying department,  
6 and all of those folks, and see if we could create  
7 advertising and promotion ideas that would meet what  
8 the brand manager wanted to do.

9 Q Sort of like a liaison between the company  
10 and the creative folks?

11 A Yeah, kind of a go-between.

12 Q How long did you work at Wells Rich, all  
13 totaled?

14 A Well, I worked there about five and a half  
15 years.

16 Q Did you work on, initially, did you work  
17 on any products that we would be familiar with?

18 A Yeah. Definitely.

19 Q Okay. Tell us about that.

20 A I worked on Safe Guard soap and Shore  
21 deodorant, both of which were Procter & Gamble  
22 products.

23 Q Soap and deodorant?

24 A Yes.

25 Q Is there anything interesting about

1 working Soap and deodorant?

2 A Yes.

3 Q What would that be?

4 A Well, I mean, you know, I think everybody  
5 thinks that is pretty boring, to work on soap and  
6 antiperspirant because kind of everybody knows about  
7 soap and antiperspirant. But the truth of the  
8 matter is they were very competitive marketplaces.  
9 When I worked on safeguard soap, Dial was our key  
10 competitor. And trying to get market share from  
11 Dial was really, really hard.

12 Q When you were at Wells Rich, did you come  
13 to learn the process by which companies make  
14 decisions about advertising and have advertising  
15 budgets?

16 A Yes.

17 Q Okay. What, in a competitive market like  
18 deodorant or so, what are the key concepts, the key  
19 things that you learned while you were at Wells  
20 Rich?

21 A Well, I think, you know, that's where I  
22 learned the whole idea about switching and  
23 competitiveness in the marketplace, that, you know,  
24 what our advertising was really trying to do, was to  
25 try to create a brand that's different from another

1 brand and so that people had a choice between this  
2 brand and another brand.

3 And that really involves two things.  
4 It involves trying get somebody to switch to your  
5 brands like Safeguard soap, but it also involves  
6 trying to make sure that people who are buying  
7 Safeguard soap don't switch to Dial soap. So, the  
8 whole idea of kind of loyal any switching were  
9 things I learned at Wells Rich Greene.

10 Q So, you said that you were at Wells Rich a  
11 total of five years, but I understand you left after  
12 a couple of years?

13 A I did.

14 Q Okay. You after a couple of years, where  
15 did you go?

16 A I went to work for a New York hospital,  
17 Cornell Medical Center in New York City.

18 Q Why did you make that move, and what did  
19 you do when you got there?

20 A I received a call from, I don't recall who  
21 it was, but someone asking me whether I would  
22 consider raising money for New York hospital Cornell  
23 Medical Center. And they told me what they were  
24 trying to do in terms of increasing their annual  
25 giving and so forth. So I said I would do that. So

1 I went over to do that.  
2 Q I gather that's a big hospital?  
3 A Oh, it is huge, yeah.  
4 Q How long did you do that?  
5 A I did it for about a year.  
6 Q Then apparently returned to Wells Rich?  
7 A Yes.  
8 Q Why did you go back?  
9 A Well, it seems like there was a lot of  
10 phone calls going on. I get a phone calls from  
11 Wells Rich Greene asking if I would come back. And  
12 I gave it a thought and did go back.  
13 Q Was there some particular project that  
14 they wanted you to work on?  
15 A Yes. They wanted me to work on the  
16 introduction of Players cigarettes for Philip  
17 Morris.  
18 Q Now, what year would this be?  
19 A That would have been about 1982.  
20 Q I don't know that we have heard that name  
21 before, Players cigarette?  
22 A Yes.  
23 Q That's a brand name?  
24 A Yes.  
25 Q Of a cigarette made by Philip Morris?

1 A Yes.

2 Q Is it still in existence today?

3 A Yes.

4 Q At that time, Ms. Lund, had you had any  
5 experience in the cigarette business?

6 A No, I hadn't.

7 Q Were you a smoker?

8 A No.

9 Q What did you -- what was your reaction to  
10 going back to Wells Rich and working on an  
11 advertising campaign for a cigarette?

12 A Well, you know, I think that when I  
13 received that phone call to go back and work on  
14 cigarettes, I had a lot of thinking to do. I had to  
15 I wasn't a smoker. My parents were smokers. I had  
16 a brother who was a smoker.

17 So, I thought, you know, I know  
18 people who smoke. I know people who didn't smoke,  
19 like myself. But I had to make a choice about  
20 whether I thought it was okay to work on cigarettes.  
21 And I had to work through that questioning to be  
22 sure that I could do it and really do it with all of  
23 my heart.

24 Q What do you mean if it was okay?

25 A Well, I mean, you know, cigarettes are

1 dangerous. And, you know, I wanted -- I wanted to  
2 be sure that I spend my life's work doing things  
3 that are important and legitimate. And cigarettes  
4 are dangerous. So, it was a big decision. I had to  
5 really, you know, wrestle with it.

6 Q All right. But eventually you took the  
7 job?

8 A I did.

9 Q Tell us about Players? Well, first of  
10 all, tell us what you did when you went back the  
11 second time to Wells Rich? Then tell us a little  
12 bit about the product that you worked on, Players  
13 cigarette?

14 A Well, I was in the account department  
15 again. I think I was an account supervisor. And  
16 Players cigarettes hadn't been introduced in the  
17 marketplace yet.

18 When I got there, it was going to be  
19 a menthol cigarette. And then our competitor R.J.  
20 Reynolds introduced another brand in this same kind  
21 of package, a very stylish black package called  
22 Sterling Cigarettes. It wasn't just a menthol  
23 cigarette. It was also a regular cigarette. So we  
24 had to scramble and completely redo everything and  
25 turn this Players cigarettes into a regular and

1 menthol cigarette.

2 Q So, maybe I missed it. So, the Players  
3 was a brand new product?

4 A It was a brand new product.

5 Q And you were involved in creating the  
6 advertising or marketing campaign sort of from the  
7 ground up?

8 A Yes.

9 Q Tell us about what Players cigarettes was  
10 all about? What was the intended niche, if you  
11 will, for Players cigarettes?

12 A Well, you know, it was in the 1980's, and  
13 there appeared to be an audience of kind of adult  
14 smokers, kind of 20-something smokers. Urban young,  
15 urban professionals. I think we used to call them  
16 yuppies. I don't know if that's still used very  
17 much. But yuppies, young urban professionals, who  
18 kind of wanted a cigarette of their own. Maybe  
19 didn't want to smoke Marlboro anymore or smoke Camel  
20 cigarettes anymore. And that's what Players  
21 cigarettes was for.

22 Q Why don't you tell us how you went about  
23 Ms. Lund, creating an ad campaign for Players?

24 A Well, I think the way one creates most any  
25 advertising campaign, it goes back to that idea of

1 kind of trying to understand the market. So we  
2 would try to understand adult smokers and why they  
3 were switching from one brand to another, whether  
4 they would like to switch to another brand, for  
5 example.

6 We would do focus group research,  
7 where we would show them the packs of cigarettes,  
8 and we would show them the ads and so forth, and see  
9 whether it communicated something that was relevant  
10 to them.

11 Q What are focus groups?

12 A Well, that's when you bring usually about  
13 seven or ten people into a small room. Usually  
14 there's a two-way glass, and sometimes people sit  
15 behind the glass and listen. And the moderator says  
16 there are people watching and listening. Then the  
17 moderator asks the folks questions about the  
18 product, asks people questions about the advertising  
19 or about the promotion ideas, and try to gather  
20 information about why these people or some other  
21 adult smokers who might want to choose what we were  
22 showing them.

23 Q Would you obtain feedback or input from  
24 these smokers about the color of the box and the  
25 advertising slogans that you were thinking of using?



1 A Oh, sure.

2 Q Is that what it's all about?

3 A It is important to hear all the of input.  
4 I'm not going to say that we would take all of the  
5 input. But you learn lots of things when you listen  
6 carefully. And sometimes I think very often the  
7 consumers really help you create your advertising.

8 Q Who would comprise these focus groups?  
9 What kind of folks?

10 A Well, we would always call adult smokers  
11 in to be the people we talk to because that's who we  
12 are marketing our products to.

13 Q Let me digress just for a moment.  
14 In your almost 20 years being  
15 involved in focus groups that involve cigarettes,  
16 how many do you think you have been involved in, in  
17 one degree or the other, of actually being behind  
18 the glass or reviewing data from focus groups? How  
19 many do you think you have been involved in at Wells  
20 Rich and Philip Morris?

21 A A lot. I mean, probably more than 100.

22 Q And looking back on those, can you think  
23 of a single instance in any of those focus groups  
24 where Philip Morris sought input from either  
25 nonsmokers or underage smokers?

1 A No, absolutely not.  
2 MR. WOBBROCK: Your Honor, I think I have  
3 a matter for the Court.

4 THE COURT: All right.  
5 Counsel, do you want the jury out?

6 MR. WOBBROCK: Yes. I have a matter for  
7 the Court.

8 THE COURT: Would you step out a moment,  
9 jurors, please?

10 \* \* \*

11 (Whereupon, the proceedings continued,  
12 out of the presence of the jury, as follows:)

13 \* \* \*

14 MR. WOBBROCK: Mr. Tauman will argue this,  
15 Your Honor.

16 THE COURT: All right.

17 Mr. Tauman, you may proceed, please.

18 MR. TAUMAN: Your Honor, this is a very  
19 narrow and very important issue and one which  
20 the defendants felt was extremely important,  
21 and that is the concept of underage smoking,  
22 which Your Honor ruled was not part of this  
23 case.

24 We have been very careful, as Your Honor  
25 knows, to confine our evidence to youth

1 smoking.

2 You may say, well, what's the difference?

3 Well, underage smoking means illegal  
4 activities.

5 Youth marketing has to do with a marketing  
6 strategy.

7 And I think that it is important the Court  
8 caution this witness and counsel that the word  
9 underage was part of their motion in limine  
10 that we voluntarily agreed to.

11 And so that concept of underage smoking,  
12 whether it's the pro or the con has not been  
13 part of this case and should not be part of  
14 this case.

15 And I'll add, just as a parenthetical,  
16 that another one of the defendant's motions in  
17 limine was the smoking habits of anyone other  
18 than people who had to do with Michelle Schwarz  
19 herself or someone who had to do with Merits.

20 Both counsel in his question and this  
21 witness in her answers repeatedly have made  
22 reference to this witness' smoking habits.

23 And counsel should be cautioned about that  
24 motion in limine also.

25 MR. DUMAS: With regard to the latter

1 point, Your Honor, I certainly don't intend to  
2 go back there again. It simply dealt with the  
3 soul searching, if that's the right word, that  
4 this witness went through when she was asked to  
5 be involved in a cigarette campaign.

6 But I certainly don't intend on asking her  
7 any further questions about her smoking  
8 situation personally.

9 MR. TAUMAN: Let me just address that  
10 issue before we go. I'm sorry. I would rather  
11 do one at a time here.

12 And that is that Mr. Dumas has  
13 acknowledged that he intentionally asked her a  
14 question that violated his own motion in  
15 limine.

16 And I think that that is -- I mean, if  
17 it's inadvertent, that's one thing. If the  
18 witness blurts it out, that's another thing.

19 But to ask the witness a question that  
20 violates the motion in limine, intentionally,  
21 to elicit that evidence for the jury, I think  
22 there has to be some caution here, Your Honor.

23 MR. PHILLIPS: Your Honor, my I address  
24 the Court?

25 THE COURT: You may, counsel.

1 MR. PHILLIPS: Again, we keep going back  
2 to what the Court ruled on that issue. And we  
3 just have a difference of opinion here.

4 We have also had both. We had Dr. Whidby  
5 testify about his smoking history without  
6 objection. That's a witness who testified  
7 regarding his smoking history.

8 The Court has not prohibited, and counsel  
9 is not reciting any chapter and verse regarding  
10 prohibition regarding a brief inquiry with  
11 respect to smoking history of any witness, for  
12 that matter.

13 Now, we have heard smoking histories from  
14 all of the family members. That's just  
15 generally gone into. They haven't  
16 over-emphasized it. They have done it.

17 We have heard from Dr. Whidby.

18 I'm not aware of any prohibition this  
19 Court has placed on Mr. Dumas or me or them,  
20 for that matter, in terms of briefly going into  
21 smoking history with respect to the prospective  
22 interests or bias of any witness.

23 I just think we did have some initial  
24 rulings. The ruling focussed primarily on  
25 whether or not I could go into the other family

1 members.

2 Ultimately, Mr. Wobbrock said we are not  
3 concerned about that during the trial because  
4 he wanted to do it himself, and that issue went  
5 by the by.

6 But, you know, when Mr. Tauman stands up  
7 and tells you that Mr. Dumas deliberately  
8 crossed a line, I don't think the Court has  
9 drawn any line with respect to inquiry of  
10 witnesses with respect to their smoking  
11 history, particularly Philip Morris witnesses  
12 for the purpose of showing either that they  
13 have some kind of interest or they have some  
14 kind of what their relationship is to their job  
15 and so forth. It's a perfectly legitimate  
16 question.

17 THE COURT: All right.

18 That second part, was anybody going to  
19 talk about the second part, underage smoking?

20 MR. DUMAS: Well, yes, Your Honor. There  
21 has been a lot of evidence offered to this jury  
22 about, quote, "youth smoking."

23 And sitting here right now, I can't  
24 represent to the Court that each and every  
25 witness called by the plaintiff used only the

1 word youth smoking.

2 But the fact of the matter is youth  
3 smoking, to most folks, means smoking under 18,  
4 since most people know that's the lawful age to  
5 purchase and consume cigarettes.

6 Certainly, the plaintiff's evidence,  
7 looking at it from their viewpoint, is that  
8 Philip Morris intentionally engaged in youth  
9 marketing.

10 I am entitled, Your Honor, to defend my  
11 client on that broad allegation. And I  
12 certainly intend on doing so with regard to  
13 evidence and testimony regarding the practices  
14 of Philip Morris as it concerns youth smoking,  
15 which is a broad subject.

16 Mr. Phillips might want to --

17 MR. PHILLIPS: I don't want to keep  
18 jumping in, but, obviously, there were a number  
19 of exhibits that were produced to the jury and  
20 shown to the jury that had numbers below the  
21 age 18. And they were there for a purpose.

22 And so, obviously, this witness, you know,  
23 is likely to be cross-examined regarding those  
24 exhibits. They have already been before the  
25 jury. And the witness needs to be able to

1 explain her job and what she does.

2 And we begin making a logistical  
3 distinction here or a semantical distinction  
4 that doesn't really ultimately any make sense,  
5 when you have documents in the record relating  
6 to Philip Morris' understanding that underage  
7 smokers do smoke and public studies that  
8 Mr. Johnson looked at and so forth.

9 All of that is before the jury at this  
10 point. So, it is perfectly all right for the  
11 witness to respond to that evidence that's been  
12 presented to the jury.

13 MR. DUMAS: And I would like to add one  
14 comment to that, Your Honor.

15 You may recall that we did a motion -- the  
16 defendant did a motion in limine to preclude  
17 redacted documents as it concerned underage  
18 smoking, below 18.

19 And we argued at some length about that  
20 issue. And we felt that references to smoking,  
21 12, 14, 16, 17 should not come in, whether in  
22 documents or argument.

23 The Court overruled that, for the most  
24 part, and allowed in Philip Morris documents,  
25 some documents that do contain references to



1 youth under 18.

2 THE COURT: All right.

3 Thank you, both counsel.

4 Let's just try to have the witnesses, when  
5 we get into that, to emphasize youth smoking,  
6 in lieu of the underage smoking.

7 Sure, some testimony will come in about  
8 underage smoking, but that is not something to  
9 emphasize because of the idea that it indicates  
10 illegal marketing. And I'm sure the marketing  
11 department of Philip Morris does not market to  
12 underage smokers.

13 But there's a youth market. And, in my  
14 opinion, from 18 to 20, there's a youth market  
15 for young people who haven't made up their mind  
16 about a lot of things.

17 You know, some of us, older folks, have  
18 gone through the situation where we have had 18  
19 and 19-year-old kids. They are not very  
20 mature. Let me tell you, they are youth, they  
21 are youth, they are youth, all the way through.  
22 And this witness, I think, has a 13-year-old  
23 son. He will be 18, one of these days. And I  
24 just want to share with her he will be a youth,  
25 he will be a full youth.

1 We just don't want to get into inferences  
2 on underage smoking. I don't think that's what  
3 you are trying to do.

4 MR. DUMAS: Well, later on, Your Honor, I  
5 am going to talk about that distinction that  
6 the Court has made and Philip Morris' view and  
7 marketing efforts with regard to young adults,  
8 youth, whatever is the correct term, 18 and  
9 older, and drawing the distinction that Philip  
10 Morris does not market or advertise  
11 intentionally to youth, under 18. And  
12 that's -- I have got to present that evidence,  
13 Your Honor.

14 THE COURT: Fine.

15 MR. DUMAS: Okay. Thank you.

16 THE COURT: Bring the jury.

17 MR. TAUMAN: Before we bring the jury in,  
18 because this is likely to come up again because  
19 Mr. Dumas has expressed an intention of doing  
20 so, the motion in limine that defendant made  
21 was titled and argued as a motion not to allow  
22 any counsel, witness, et cetera to mention  
23 youth smoking, youth marketing or underage  
24 smoking.

25 And we agreed that we would not mention

1 underage smoking.

2 The Court denied the balance of their  
3 motion, with a limitation that it had to be  
4 some reference to Michelle Schwarz.

5 Our argument was, of course, that by  
6 targeting youth, and I will call youth even  
7 lower than 18, people who are under 18, they  
8 were in a sense grooming or giving her  
9 permission to smoke.

10 And I think Your Honor agreed that it had  
11 to be something that had a proximity, a nexus,  
12 with Michelle Schwarz.

13 I believe this witness has been called  
14 primarily to give evidence to this jury about  
15 the new Philip Morris, the new Philip Morris  
16 since 1998, the new Philip Morris that now has  
17 an anti-youth smoking program, the Weak Heart  
18 Program, the Access Program.

19 This is totally irrelevant to any issue  
20 that Your Honor has allowed under the rubric of  
21 youth smoking. And we are going to find  
22 ourselves with the jury out, you know, in an  
23 hour or two hours talk about just this.

24 So, I think we should get it on the table  
25 and get it decided.

1 We were both prohibited by the Court and  
2 honored that in focussing our evidence on  
3 marketing to youth in a time proximity to  
4 Michelle Schwarz' commencement of smoking.

5 This witness, of course, will reflect on  
6 her age at that time, but the fact is that she  
7 certainly wasn't working for Philip Morris at  
8 that time.

9 MR. DUMAS: First of all, Your Honor, we  
10 lost our motion in limine regarding youth  
11 smoking, first and foremost.

12 Second, this witness is going to talk  
13 about Philip Morris' marketing from 1960  
14 forward, specifically as it addresses, as it  
15 relates to Benson & Hedges cigarettes. Okay.  
16 We are entitled to do that.

17 Second and third, I should say, this  
18 witness is going to address changes that have  
19 occurred in Philip Morris starting around 1995  
20 and the changes that are ongoing up to today.

21 This is a punitive damages case, Your  
22 Honor. We are entitled to present evidence  
23 concerning the defendant's post-injury conduct.  
24 And we intend on doing that, Your Honor.

25 THE COURT: All right.

1 It seems that there is a nexus with the  
2 Benson & Hedges since Michelle Schwarz smoked  
3 Benson & Hedges during that time, and they are  
4 going to talk about advertising during that  
5 time.

6 And certainly counsel has a right to  
7 cross-examine on new changes that have been  
8 made that were not present at the time that  
9 Michelle Schwarz was in the process of smoking.

10 MR. TAUMAN: Yeah. I know we have an  
11 opportunity to cross-examine. I agree with you  
12 entirely.

13 But if this witness is giving evidence on  
14 their marketing goals, efforts, trends,  
15 whatever, during the relevant time period that  
16 Your Honor has set out, we have no objection.  
17 We may not like what she says, but we have no  
18 objection, and we can cross-examine her.

19 When she starts talking about the, maybe  
20 Your Honor is familiar with this, the Access  
21 Program, the Weak Heart program, the things we  
22 see on TV ads, starting, you know, last year or  
23 the year before, that have nothing to do with  
24 Michelle Schwarz.

25 The defendant argued repeatedly that any

1 evidence of punitive damages has to have some  
2 causal connection to Michelle Schwarz.

3 You know, we didn't like it, but we  
4 realize that this is not an indictment process  
5 that is a part from this case, that there has  
6 to be that some type of causal nexus with the  
7 damage and the injury that Michelle Schwarz  
8 suffered.

9 Likewise, the response, the evidence  
10 against punitive damages has to have that same  
11 nexus. And, clearly, this evidence that we are  
12 talking about from 1995 or 1998 or 1999 or 2001  
13 or 2002 has no nexus to any injury suffered by  
14 Michelle Schwarz.

15 MR. PHILLIPS: Your Honor, this is an  
16 unbelievable argument based on the way they  
17 have presented their case.

18 They put on evidence suggesting that  
19 Michelle Schwarz was groomed to start smoking  
20 Benson & Hedges on her 18th birthday. They  
21 argued, put on an offer of proof, and won that  
22 after the Court had preliminarily said, no, we  
23 are not going to go beyond that period, and  
24 showed documents in the 70's and 80's saying we  
25 need to show that, Your Honor, because it shows

1 the continuing conduct. Philip Morris is still  
2 marketing, targeting youth. And he put it all  
3 on, and he got all of that evidence in.

4 And Mr. Dumas is absolutely right. We  
5 have to be able to respond to that to show both  
6 that that is not what we did then and we have  
7 doubled efforts now to prevent kids from  
8 smoking.

9 This is punitive damages case. And it is  
10 absolutely linked to the allegations in this  
11 case that say that Michelle Schwarz was groomed  
12 to begin smoking before her 18th birthday by  
13 Philip Morris. That's a material allegation in  
14 this case.

15 And if there's an allegation with respect  
16 to punitive damages, with respect to that, then  
17 we need to be able to show that that didn't  
18 occur and there's no need to punish Philip  
19 Morris today with respect to that conduct  
20 because, to the extent you conclude it did  
21 exist in 1960, it certainly doesn't exist  
22 today.

23 THE COURT: Let me ask you a question,  
24 counsel.

25 You are going fast. Slow it down just a

1 bit.

2 MR. PHILLIPS: I apologize. It is only  
3 Monday morning. I have got to slow down.  
4 Sorry.

5 THE COURT: If this witness would like to  
6 talk about the Weak Heart Program, what nexus  
7 is that with Michelle Schwarz?

8 She never saw a Weak Heart Program? How  
9 do you connect that?

10 If your argument is their allegations are  
11 that we groomed underage people so that, when  
12 they became smoking eligible, they would be  
13 ready --

14 MR. PHILLIPS: Right.

15 THE COURT: And your defense says we  
16 didn't do that. And you put your evidence on,  
17 we didn't do that. So, since you didn't do  
18 that, why do you want to pile on the new  
19 programs that you just out of the goodness of  
20 your heart decided to do, like the Weak Heart  
21 Program and the various programs that are in  
22 effect now that are not in response to those  
23 things that you didn't do, because you didn't  
24 do them? These are completely new things that  
25 have an angelic glow because it didn't come



1 from any ulterior motives or ulterior  
2 procedures. Just the company grew and expanded  
3 and decided we are going to do things  
4 different, but it wasn't in response to any  
5 prior bad conduct.

6 So I'm saying I don't see the connection.

7 If you are saying we did do some prior bad  
8 conduct, and as punitive damages issue here's  
9 what we changed, that might be one thing.

10 But if your argument is we didn't do  
11 anything wrong, and here's how we changed, I  
12 don't see the relevance of here's how we  
13 changed to no prior bad conduct, because  
14 generally it is like rehabilitating a witness.  
15 Rehabilitating an entity. If the entity didn't  
16 do the bad thing, then there's no need to  
17 rehabilitate that entity.

18 You only need to rehabilitate the person  
19 who has allegedly done something that they  
20 should not have done. Then you have a right to  
21 rehabilitate that person and bring them up on a  
22 higher level.

23 So, a corporate entity, rehabilitation  
24 would not span any greater view than an  
25 individual witness that you was trying to

1 rehabilitate.  
2 MR. PHILLIPS: Two responses, Your Honor.  
3 The first one is this.  
4 They put on evidence in the 70's and the  
5 80's that Michelle Schwarz, when she was a 30  
6 and 40-year-old woman, that Philip Morris was  
7 still tracking kids, was still looking at  
8 underage kids. The documents were shown to the  
9 jury. You saw the numbers. They were all  
10 shown to the jury, Your Honor.  
11 THE COURT: Right. You guys plan to  
12 respond to that.  
13 MR. PHILLIPS: Absolutely. And that is  
14 part of what we are saying in terms of saying  
15 we didn't do it in the 60's -- we didn't do it  
16 in the 60's, we didn't do it in the 70's, we  
17 didn't do it in the 80's, and we didn't do it  
18 in the 90's, and we are not doing it now.  
19 Now, on the second question, which is,  
20 well, isn't that inconsistent? Don't you have  
21 to admit you did something wrong, if you are  
22 saying you're doing something good now?  
23 I mean, that's a rhetorical point you're  
24 making with me, Your Honor. Isn't it, really?  
25 It is not a question of what the defendant

1 has the right to do with respect to defending  
2 itself.

3 The jury has to determine in this case, if  
4 it determines that there's liability, and  
5 that's what we are talking about, this is a  
6 unitary trial, we wanted to bifurcate some of  
7 these issues, this is a unitary trial, so we  
8 have to defend against both liability and  
9 punitive damages at once.

10 And in doing that we, in fact, have to do  
11 both things. We have to say we didn't do that  
12 and show the evidence on that.

13 And we need to show, in the punitive  
14 damages context, ladies and gentlemen of the  
15 jury, if you disagree with us, then you need to  
16 know about whether what we are doing now for  
17 purposes of evaluating the importance of  
18 punitive damages to deter us now.

19 Is it important to you, as a jury, to  
20 award \$300 million, as Mr. Wobbrock so urgently  
21 asks you to do, when we are doing the things  
22 that we are doing now in the marketplace and we  
23 are doing more than anybody else is doing?

24 That's important, Your Honor. That's very  
25 important in the context of a statute in this

1 state which requires the jury to evaluate the  
2 deterrent effect of punitive damages.

3 We have a unitary trial. Liability and  
4 punitive damages are being addressed at the  
5 same time. And this jury they have to be able  
6 to deal with both of those issues.

7 MR. DUMAS: Your Honor, may I add, very  
8 briefly, Your Honor?

9 THE COURT: Certainly, counsel.

10 MR. DUMAS: This witness' testimony is not  
11 inconsistent with Philip Morris' stated  
12 position, as Mr. Phillips indicated, because  
13 this witness is going to say Philip Morris  
14 understands that its advertising was out there  
15 in the general world.

16 And, yes, because of the very nature of  
17 advertising you can't insulate folks under 18.

18 And some of those folks probably saw some  
19 of those ads. And how are we going to deal  
20 with that? And here's how we are dealing with  
21 it.

22 In a punitive damages case where there's  
23 been a lot of evidence of underage youth  
24 smoking, the defendant is entitled to put that  
25 evidence on, Your Honor, for the jury's

1 consideration.

2 THE COURT: Counsel for the plaintiff,  
3 anything further?

4 MR. TAUMAN: Not really.

5 I think that we are still at the same  
6 place, that we were required to show a nexus  
7 between the behavior of Philip Morris in  
8 targeting youth with the life experience of  
9 Michelle Schwarz.

10 Your Honor did allow us to go somewhat  
11 beyond the 1964 data. I believe that we had  
12 documents that reflected a policy into the 70's  
13 that Philip Morris had of studying youth and  
14 targeting youth.

15 But we were not allowed to go any place  
16 beyond the 1970's.

17 Our argument for the 1970's is that that  
18 was close enough in time that it reflected a  
19 mindset of Philip Morris that then proved --  
20 that that sort of reinforced the documents that  
21 we had that were contemporaneous with Michelle  
22 Schwarz' smoking history.

23 I think that allowing the witness to go  
24 essentially into contemporary times, into the  
25 current era, is simply an apology to the jury

1 and allowing them to consider sympathy for  
2 Philip Morris.

3 This is not -- I mean, obviously, they  
4 have used their powerful public relations  
5 scheme to put this in front of the American  
6 people.

7 And I would bet you anything that each of  
8 these jurors has seen that on television, but  
9 it doesn't have a relevant place in the  
10 courtroom.

11 They would like to say that they are good  
12 people now, but the issue that the Court has  
13 laid down or the restriction the Court has laid  
14 down is that they have to show that they were  
15 good people at the time in relation to Michelle  
16 Schwarz.

17 MR. DUMAS: Your Honor, in a punitive  
18 damages case a defendant is unentitled to  
19 defendant themselves by putting evidence on of  
20 how they have responded to a problem. And that  
21 response is started six years ago or so and it  
22 continues today.

23 And the Court will instruct the jury that  
24 part of what the jury is to consider is how the  
25 defendant responded to the problem.

1 And this is evidence. This is the key  
2 that evidence that we need to get out in front  
3 of this jury.

4 Counsel can cross-examine. He can  
5 cross-examine to say it is too little, too  
6 late. He can cross-examine that, you know, we  
7 are not really doing it because we are nice  
8 people, we are doing it because of litigation  
9 strategy, et cetera, et cetera. And I'm sure  
10 he will do that. But the jury is entitled to  
11 hear that evidence and make its own decision.

12 THE COURT: The Court is inclined to agree  
13 with the defense on that, counsel, that, as to  
14 the punitive damage aspect of the case, they  
15 should be allowed to present evidence of the  
16 changes that they have made.

17 It appears to the Court it is like playing  
18 with fire. You have a right to play with fire,  
19 if you wish. But you also have to be aware of  
20 the fact that you can get burned by it.

21 The Court is going to let them play with  
22 the fire. And we shall see the results. That  
23 is the Court's ruling.

24 Bring the jury, please.

25 MR. TAUMAN: Thank you, Your Honor.

1 MR. DUMAS: Are we going to take a 10:30  
2 break, Your Honor?

3 THE COURT: Yes.

4 MR. DUMAS: Otherwise, I was going to ask  
5 for a one-minute continuance.

6 THE COURT: We will stop at 10:30.

7 MR. TAUMAN: You have to run out between  
8 questions.

9 \* \* \*

10 (Whereupon, the proceedings continued, in the  
11 presence of the jury, as follows:)

12 \* \* \*

13 THE COURT: All right.

14 Mr. Dumas, will you proceed with your  
15 questions, please?

16 MR. DUMAS: Thank you, Your Honor.

17 BY MR. DUMAS:

18 Q Ms. Lund, before the break, we were  
19 talking about work with Players cigarettes; correct?

20 A Yes.

21 Q You talked a little bit about the focus  
22 groups that you were involved with for Players  
23 cigarettes; correct?

24 A Correct.

25 Q And you were also talking about the



1 up-to-100 or so focus groups that you have been  
2 involved with during your 20 years or so in the  
3 cigarette business?

4 A That's correct.

5 Q All right. We are not going to repeat  
6 that stuff. But I wanted to, before we move on to  
7 Benson & Hedges cigarettes, which is something I  
8 want to get to you in just a moment, I want to go  
9 back on one issue and be sure I understand your  
10 testimony. And that is concerning the issue of the  
11 importance of consumer input in what you do. Would  
12 you please tell us how important that is?

13 A Well, I think it is very important. I  
14 think that, you know, we can't operate in a world  
15 where we don't understand our consumers. And I  
16 think that, as marketers, I think good marketers  
17 really try to understand the market, try to  
18 understand what smokers want, whether our products  
19 can deliver it. In order to be successful, I think  
20 one has to do that. And we have to seek the input,  
21 ask the questions, show ideas. And I would say I  
22 think it's very important.

23 Q When it comes to the marketplace,  
24 Ms. Lund, who is in control, the consumers or Philip  
25 Morris or the advertisers?

1           A     Well, you know, I think a lot of people  
2     have a lot of opinions about that. My opinion is  
3     that the marketplace is in control.

4           MR. WOBBROCK: Your Honor, this witness is  
5     called as a fact witness, not listed as an  
6     expert witness. I think opinions are beyond  
7     the scope of this witness' testimony.

8           MR. DUMAS: Your Honor, her position with  
9     Philip Morris certainly entitles her to give  
10    some opinions concerning marketing and  
11    advertising. That will be the subject of her  
12    testimony.

13          MR. WOBBROCK: Your Honor, that may be the  
14    case, but they did not identify this witness as  
15    an expert but only as a fact witness. And if  
16    they wanted to call this witness as an expert,  
17    they should have alerted us and the Court.  
18    That is not following the rules of this case.

19          MR. DUMAS: Your Honor, you need not  
20    identify your client as an expert witness.

21          Ms. Lund is a representative of my client.  
22    And, as a lay person, under the Oregon Rules of  
23    Evidence, she's entitled to express an opinion  
24    regarding facts and matters within her  
25    knowledge and understanding.

1 THE COURT: All right.

2 Counsel, in this situation, under certain  
3 accepted situations the Court will allow lay  
4 witnesses to give opinion testimony in certain  
5 areas. And the weight of the value of that  
6 testimony is for the jury to determine. The  
7 jury looks at the person's experience and  
8 determines does this person have that  
9 experience to give an opinion on this?

10 And I think, in this case, she would  
11 appear to have that type of experience as a  
12 marketing, vice president of marketing for one  
13 of the largest corporations in the United  
14 States.

15 MR. DUMAS: Thank you, Your Honor.

16 THE COURT: Probably has some experience  
17 in marketing issues.

18 MR. WOBBROCK: Your Honor, if I could be  
19 heard on that? I'm sorry.

20 THE COURT: All right.

21 Let's let the jury step out again. Step  
22 out please and take a little break, and we'll  
23 be back to you shortly. Thank you.

24 Exercise is good. Exercise is not bad.

25 \* \* \*

1 (Whereupon, the proceedings continued, out  
2 of the presence of the jury, as follows:)

3 \* \* \*

4 THE COURT: Well, thank you, counsel, for  
5 doing that, because you were talking a little  
6 too much before the jury, and it's appropriate  
7 to get the jury out if we are going to have  
8 that much conversation going on between counsel  
9 and the Court.

10 All right. Proceed, counsel.

11 MR. WOBBROCK: I have got to say, Your  
12 Honor, the defense is really keeping me on my  
13 toes, but our agreement was that we would  
14 disclose expert witnesses. And that was the  
15 Court's order.

16 You will see here on your screen, Your  
17 Honor, item two, Mr. Whidby, who is now a  
18 current -- excuse me, Mr. Burnley, who is now a  
19 current employee. They describe what would be  
20 his expert testimony. Cigarette design and  
21 manufacturing, process engineering, Philip  
22 Morris, Incorporated.

23 Dr. Whidby, who is also a consultant, they  
24 described what his testimony would be.

25 Now there's no question that perhaps

1 Ms. Lund may be an expert, qualified to give an  
2 expert opinion. But that's not, if you will  
3 see here, this is our handwriting, when they  
4 disclosed, upon our request, where she was  
5 from, they only put down her name. Simply her  
6 name. There was no indication whatsoever that  
7 this was going to be the subject of expert  
8 testimony.

9 Now, I would just say to the Court's  
10 comment that lay witnesses may give expert  
11 testimony, my understanding of that, Judge, is  
12 things like this.

13 THE COURT: No, no, no. You probably  
14 misunderstood me. I didn't say that lay  
15 witnesses give expert testimony. I said lay  
16 witnesses can give opinion testimony if the  
17 opinion is in something that they are familiar  
18 with, in certain exceptions.

19 MR. WOBBROCK: Right.

20 And I think, and I misstated what the  
21 Court said there, but I think what I have  
22 always understood that to apply, for example,  
23 if a lay person is standing on a corner, and a  
24 car goes by, they can say I think that is 40  
25 miles an hour, that car. I have had experience

1 with driving and cars, and I think that car was  
2 going 40 miles an hour.

3 I don't think that that rule has  
4 application to this.

5 We have been effectively sandbagged if  
6 this Court allows this witness to start giving  
7 expert opinions.

8 Sure, she's an employee. But any another  
9 employee that has been listed as an expert,  
10 such as Mr. Burnley, who is a current employee,  
11 they told us he was going to be an expert,  
12 right here.

13 This witness, they simply listed her name.  
14 It was only after we questioned them where is  
15 she from that they even told us where she was  
16 from.

17 We thought she might be a neighbor of the  
18 Schwarz' family in St. Louis when we started.

19 So, Your Honor, I strongly say that, if  
20 she is going to give expert testimony, it is  
21 outside the rulings of this Court and it should  
22 not be permitted.

23 Just because she is an experienced  
24 marketer, if they wanted to offer that, they  
25 could have alerted us to that and given us that

1 information. They didn't do it.

2 Now they are trying to come in and have  
3 her give opinions that are way outside a fact  
4 witness' basis to testify in this case. And  
5 that's what she's here for, a fact witness.

6 MR. DUMAS: First and foremost, Your  
7 Honor, a lay witness is entitled to give  
8 opinions that come within their sphere of  
9 knowledge and experience, first and foremost.

10 Second, with regard to this disclosure of  
11 expert witnesses, I disagree with Mr. Wobbrock.

12 I'm not going to ask this witness expert  
13 opinions and whether she has opinions to a  
14 reasonable degree of marketing certainty.

15 Okay.

16 But, frankly, I think I would be entitled  
17 to do that.

18 Mr. Wobbrock and I frequently exchange  
19 expert witnesses lists on the morning of trial  
20 in medical malpractice and products liability  
21 cases.

22 He knows that I do not have to list my  
23 client, whether it is Dr. Jones or Dr. Smith as  
24 an expert witness.

25 I can put my client on the stand, and my

1 client can give an opinion about whether or not  
2 he thinks he met the standard of care.

3 Or my client can get on the stand, as an  
4 engineer, representing a company, and say I  
5 think I designed this widget appropriately, and  
6 I'm an engineer.

7 And he knows that. And he's trying to  
8 bamboozle the Court, Your Honor.

9 Now, as I said, I think we are having a  
10 tempest in a tea pot. I'm not going to ask  
11 this witness foundation-type expert-opinion  
12 questions. I'm simply going to ask her her  
13 opinion, as a person who's employed at Philip  
14 Morris, about what they have done. That's all  
15 I intend on doing. And I would like to be able  
16 to conduct my direct examination, Your Honor.

17 THE COURT: Counsel, your response.

18 MR. TAUMAN: Your Honor, one thing. I  
19 know there's a rule against addressing counsel  
20 directly. So, I'm going to address this  
21 question to you, and maybe you'll address it to  
22 Mr. Dumas.

23 That it is true, is it not, Mr. Dumas,  
24 through the Court, that Mr. Dumas and I  
25 exchanged an e-mail discussion about what the



1 required disclosures were for expert witnesses,  
2 that we exchanged e-mails, and we agreed upon  
3 it?

4 And, in fact, there was some  
5 misunderstanding about it, whether lay  
6 witnesses had to, you had to disclose the  
7 location of those witnesses.

8 And Mr. Dumas eventually agreed that that  
9 was part of our agreement, that lay witnesses  
10 have to have their location disclosed.

11 And that's why you saw the handwriting on  
12 that, that paper.

13 All I'm saying is that, if Mr. Dumas is  
14 harking back to other cases that Mr. Wobbrock  
15 and he had, it is totally out of the picture  
16 here.

17 According to the case management order,  
18 and according to Mr. Dumas' and my very  
19 specific written agreement, expert witnesses  
20 would be identified by the topic, by the degree  
21 that they held, by their specialty and by their  
22 location.

23 And this was not done with this particular  
24 witness.

25 MR. DUMAS: Mr. Tauman's representation

1 regarding our communications is 100 percent  
2 accurate, Your Honor. I'm not going to be  
3 asking this witness expert opinion questions.

4 MR. WOBBROCK: Well, then, Judge, the  
5 opinions are irrelevant. You know, it is a  
6 subject of expert opinion, marketing. You  
7 can't just ask her opinions without any  
8 foundation, without anything.

9 By the way, as some effort to "bamboozle"  
10 the Court, I can assure the Court I haven't  
11 heard that word for awhile. I kind of like it.

12 MR. DUMAS: It's a good word.

13 MR. WOBBROCK: But I can assure the  
14 Court --

15 MR. TAUMAN: That you're going to hear it  
16 again.

17 MR. WOBBROCK: -- that in malpractice  
18 cases we never disclose the subject or the  
19 foundation or the background of the witnesses.  
20 We simply identify doctors so that somebody on  
21 the jury who has a physician-patient  
22 relationship doesn't end up calling for a  
23 mistrial. That's what we do.

24 That issue has nothing to do with the  
25 Court's prior management order in this case,

1 which is exactly as Mr. Tauman has described,  
2 their obligation to tell us.

3 Now, they hired somebody from the company,  
4 which -- why didn't this apply to Mr. Burnley?  
5 Mr. Burnley, they told us what he was going to  
6 talk about, process engineering, chemical  
7 engineering. That sort of thing. He worked  
8 for the company.

9 If that was the case, why did they have to  
10 tell us in Mr. Burnley's case?

11 They are trying to go beyond what this  
12 Court has ordered, which is, if she's a lay  
13 witness, she gives facts. And that's what  
14 she's here for, facts.

15 And I'm sure she's got abundant facts.  
16 She's been inside that corporation for 17  
17 years. She doesn't need to go beyond facts and  
18 start giving us opinions.

19 MR. DUMAS: Your Honor, she's my client.  
20 She's entitled to give her opinion about what  
21 she did, why she did it, and the effect of what  
22 she did or didn't do. And if I can't do that,  
23 Your Honor, I can't defend my client.

24 THE COURT: All right.

25 I thank counsel very much. We are taking

1 the morning break right now. And the Court  
2 will look at Oregon Evidence Rule 701.

3 Thank you. Court is out of session.

4 The witness may step down.

5 And let the jury know that we are taking  
6 our morning break.

7 \* \* \*

8 (Whereupon, a recess took place, and Vol. 37-A  
9 concluded. Vol. 37-B was reported by  
10 Katie Bradford.)

11 \* \* \*

12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

1     STATE OF OREGON             )  
                                      )   SS.  
2     County of Multnomah       )

3  
4             I, Jennifer Wiles, hereby certify that I  
5             am an Official Court Reporter to the Circuit  
6             Court of the State of Oregon for Multnomah  
7             County; that I reported in Stenotype the  
8             foregoing proceedings and subsequently  
9             transcribed my said shorthand notes into the  
10            typewritten transcript, pages 1 through 69,  
11            both inclusive; that the said transcript  
12            constitutes a full, true and accurate record of  
13            the proceedings, as requested, to the best of  
14            my knowledge, ability and belief.

15            Dated this 22nd day of August, 2002 at  
16            Portland, Oregon.

17  
18  
19

20                             \_\_\_\_\_  
                              Jennifer Wiles  
                              Official Court Reporter

21  
22  
23  
24  
25

